

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS: 99-0399**  
**Indiana Corporate Income tax**  
**For the Tax Years 1988 Through 1997**

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**ISSUE**

**I. Imposition of State Corporate Income Tax on Out-of-State Provider of Services to Indiana Customers.**

**Authority:** IC 6-3-2-1; IC 6-3-2-2(a); IC 6-3-2-2(a)(2); IC 6-2.1-1-2(a); IC 6-2.1-2-2; IC 6-2.1-2-2(a)(2); IC 6-8.1-5-1(b); Bethlehem Steel v. Dept. of State Revenue, 597 N.E.2d 1327 (Ind. Tax Ct. 1992); Indiana-Kentucky Elec. Corp. v. Indiana Dept of State Revenue, 598 N.E.2d 647 (Ind. Tax Ct. 1992); 45 IAC 1-1-49; 45 IAC 1-1-120; 45 IAC 3.1-1-38.

Taxpayer is an out-of-state provider of reporting services. Taxpayer protests the audit's determination to subject taxpayer's Indiana source income to the state's corporate income tax. Taxpayer believes its activities are not sufficient to establish nexus with Indiana.

**STATEMENT OF FACTS**

Taxpayer provides reporting services, of varying degrees of complexity and specificity, to various consumers of these services. Typical consumers of taxpayer's services include television stations, radio stations, municipalities, and other entities requiring immediate and particularized information. Certain of the consumers are located in Indiana.

Taxpayer alleges that it assembles and prepares the information at its Pennsylvania headquarters. The information is transmitted to consumers in one of two ways. Information is transmitted by means of telephone lines or by satellite. When the information is transmitted by satellite, the following procedure is followed. Taxpayer transmits the information to a third-party satellite service located in Illinois. The third-party satellite service broadcasts the information to a satellite at which point the information becomes available to authorized consumers. The authorized consumers can down-link the information by means of specialized satellite receiving equipment. In some instances, the consumer makes use of its own equipment to access the

information. In other instances, the necessary receiving equipment is obtained directly from the third-party satellite service provider.

Taxpayer does not own real or personal property within the state. Taxpayer does not assemble or prepare the information within the state. Taxpayer does not maintain personnel within the state. There is no indication that taxpayer sends its personnel into the state for the purpose of soliciting new customers or for providing localized services for existing customers.

The audit determined that taxpayer's Indiana source income, derived from the information delivered via satellite, was subject to Indiana corporate income tax. The audit determined that the receipt of the information – from satellite to Indiana location – was intrastate in nature and subject to the gross income tax and to the adjusted gross income tax. Because the taxpayer declined the opportunity to provide the audit access to the necessary information, the audit calculated taxpayer's tax liability based on the "best information available."

## **DISCUSSION**

### **I. Imposition of State Corporate Income Tax on Out-of-State Provider of Services to Indiana Customers.**

#### **A. Adjusted Gross Income Tax.**

IC 6-3-2-1 imposes a tax on the adjusted gross income derived from "sources within Indiana." IC 6-3-2-2(a) provides that adjusted gross income derived from sources within Indiana includes "income from doing business in this state." IC 6-3-2-2(a).

45 IAC 3.1-1-38, in interpreting IC 6-3-2-2(a), provides that for apportionment purposes a taxpayer is "doing business" in Indiana if it operates a business enterprise or activity in Indiana including, but not limited to:

- (1) Maintenance of an office or other place of business in the state
- (2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
- (3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
- (4) Rendering services to customers in the state
- (5) Ownership, rental or operation of a business or of property (real or personal) in the state
- (6) Acceptance of orders in the state
- (7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

It is apparent that taxpayer falls outside the ambit of the state's adjusted gross income tax scheme. Under the facts presented by the taxpayer and as contained within the audit report, there is no indication that taxpayer's income is "income [derived] from doing business in this state."

IC 6-3-2-2(a)(2). Instead, taxpayer's services – consisting of the gathering, analyzing, and “packaging” of information – occurs entirely outside the state. Taxpayer's Indiana customers may be the beneficiaries of that information, but there is no indication that the performance of the service occurs within the state.

## **B. Gross Income Tax.**

Under the provisions of IC 6-2.1-2-2, the Indiana gross income tax is imposed on the receipt of “the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.” IC 6-2.1-2-2(a)(2).

Taxpayer asserts that it is not subject to the state's gross income tax. The Indiana tax court has set forth a three-part test to determine whether a non-resident taxpayer has sufficient contacts with the state to warrant imposition of the gross income tax. The taxability of a non-resident taxpayer is dependent on determining whether (1) the taxpayer's receipts constitute “gross income,” (2) whether the “gross income,” is derived from “sources within Indiana,” and (3) whether the “gross income,” derived from those sources within Indiana is “taxable gross income.” Bethlehem Steel v. Dept. of State Revenue, 597 N.E.2d 1327, 1330 (Ind. Tax Ct. 1992), *aff'd* 639 N.E.2d 264 (Ind. 1994). *See also* Indiana-Kentucky Elec. Corp. v. Indiana Dept of State Revenue, 598 N.E.2d 647, 661 (Ind. Tax Ct. 1992).

As a preliminary question, it must be determined that the receipt of income from the performance of a contract represents Indiana gross income. IC 6-2.1-1-2(a) provides that “[e]xcept as expressly provided in this article, ‘gross income’ means all the gross receipts a taxpayer receives . . . from the performance of contracts.” Taxpayer has entered into various contracts to provide information services to recipients located within the state of Indiana. Those Indiana recipients pay for those services. Taxpayer receives that payment. Accordingly, under IC 6-2.1-1-2(a), those payments constitute “gross income” for the purpose of determining the applicability of the state's gross income tax.

It is the second provision of the Bethlehem Steel test which is central to taxpayer's protest. In order for the Department to establish that taxpayer's income is subject to the state's gross income tax, the Department must establish that taxpayer's income is derived from a source within Indiana. Specifically, “[i]f the activities giving rise to the income sought to be taxed do not occur within Indiana, then the tax may not be levied – not because to do so is forbidden by the United States Constitution (although it may well be) – but rather because under those facts the levy is forbidden by the statute.” Bethlehem Steel, 597 N.E.2d at 1330. 45 IAC 1-1-120 instructs in part that “[a]s a general rule, income derived from sales made by nonresident sellers to Indiana buyers is not subject to gross income tax unless the seller was engaged in business activity within the State [i.e., tax situs].” The court in Indiana-Kentucky explained stating that “the regulations teach that a nonresident is subject to taxation if the ‘source’ of the gross income is an Indiana *tax situs*, i.e., an Indiana *business situs* at which business activities are performed that are connected with or facilitate the transaction . . . giving rise to the gross income.” Indiana- Kentucky, 598 N.E.2d at 662 (*Emphasis added*).

Based upon the information provided by the taxpayer, it is apparent that taxpayer has entered into contracts for the provision of specialized reporting services to Indiana customers. However, those services are performed entirely out-of-state and the income here at issue is derived exclusively from the performance of those out-of-state services.

Therefore, it appears – based exclusively on the limited information that the taxpayer chose to present to the Department – that the taxpayer falls outside the purview of the state’s gross income tax provisions because there is no indication that taxpayer has contacts with the state sufficient to establish an Indiana business situs from which taxpayer’s Indiana source income is derived. Based on that limited information, it would appear that taxpayer has no personnel or property within the state. Similarly, there is no indication that taxpayer’s representatives enter into the state either to conduct or facilitate the taxpayer’s business. Whatever taxpayer’s Indiana activities may be, there is insufficient evidence to establish that those activities are “more than minimal, and not remote or incidental to the total transaction . . . .” Indiana-Kentucky, 598 N.E.2d at 663.

Accordingly, to the extent that taxpayer’s documentary information can be verified by the supplemental audit, taxpayer’s protest is sustained. The ability of the supplemental audit to verify taxpayer’s factual assertions is, of course, subject to the requirement that taxpayer provide unfettered access to the information necessary to verify those assertions. To that end, taxpayer is reminded of the provisions contained with IC 6-8.1-5-1(b) which states that the “burden of the proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.”

### **FINDING**

Taxpayer’s protest is sustained subject to verification by the supplementary audit.